No. 14908.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANCHO BARNES, also known as FLORENCE LOWE BARNES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal From the United States District Court for the Southern District of California, Northern Division.

APPELLANT'S REPLY BRIEF.

PANCHO BARNES,
Box 37,
Cantil, California,
Appellant In Propia Persona.

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TABLE OF AUTHORITIES CITED

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I.

A Cause of Action for Trespass Under the Federal Tort Claims Act Is Not Barred by the Subsequent Filing of a Condemnation Action by the Government.

The Government's position is that a landowner's cause of action for trespass under the Federal Tort Claims Act is automatically terminated by the subsequent filing of a condemnation action by Government. The rationale is that the tortious act is ratified by the institution of the condemnation proceeding, and, by ratification, the tort is necessarily converted into a lawful taking *ab initio*. No authority cited by the Government supports so broad a rule.

The difficulty is that not every trespass or every series of trespasses by Government agents constitute a "taking" in the constitutional sense.

Whether the invasion of the landowner's proprietary interests constitutes a "taking" depends upon a number of factors, including the character and duration of the invasions, the nature and extent of the actor's authority, and the intention with which the act or acts were done. Whether, under all the circumstances of a particular case, the conduct constitutes a trespass or a series of trespasses or a taking in the constitutional sense frequently presents nice questions of fact and law. (*See, for example,* the discussion of this issue by Mr. Justice Holmes, speaking for the majority of the Court, in *Portsmouth v. Harbor Land & Hotel Co. v. United States,* 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922), and the dissent of Mr. Justice Brandeis.)

If the tortious act does not amount to a taking, the landowner is not permitted to treat it as a taking and demand compensation under eminent domain proceedings. He is remitted to an action for the tort under the Federal Tort Claims Act.

There is no suggestion in the authorities that a trespass, not constituting a taking, becomes compensable as if it were a taking by reason of the filing of condemnation proceedings by the Government at some later date.

The point may be illustrated by a hypothetical case. Suppose that an agent of the Government trespasses upon *X's* land to hunt dove. One year later, the Government institutes condemnation proceedings in respect of the property upon which the trespass was made. Could it be successfully contended by *X* that the trespass had been there-

by converted into a taking which was compensable in the condemnation action? Or if *X* had filed suit under the Federal Tort Claims Act for damages for the trespass, could the Government successfully contend that the action was barred by the institution of the condemnation suit? Is the result any different if the Government condemned the land to turn it into a Federal game preserve? Or is the result any different if the Government condemned the land to establish a recreational area including a hunting club for military personnel?

The authorities relied upon by the Government, *Shoshone Tribe v. United States,* 299 U. S. 476 (1937), and *Crozier v. Krupp,* 224 U. S. 290 (1912) are clearly distinguishable from the case at bar. Both cases were concerned with an actual appropriation of property by an officer of the Government for the benefit of the Government; the officer at the time of the taking did not have statutory authority for his actions. Subsequent legislation authorized reparation to the property owners for the very acts done by the officers. No eminent domain proceedings were instituted at any time in either case. Since both actions were tried before the adoption of the Federal Tort Claims Act, the only theory available upon which to fasten compensation was a prior taking in the constitutional sense.

That there was no question in the *Shoshone* case of subsequent condemnation is apparent from the Court's statement, speaking through Mr. Justice Cardozo, at page 492:

> ". . . The reports of the Committees of Congress preceding the two bills. . . make it plain that the purpose was to give reparation to the claim-

> ant for an 'alleged unlawful appropriation' effected in the past, not to make a new and lawful appropriation by an exercise of sovereign power . . ."

In the *Crozier* case, the question principally involved was whether the plaintiff could obtain an injunction to prevent continued infringement of its patents by an officer of the Government who was using the patented articles for the benefit of the Government; in reaching its decision on this point, however, the Court discussed the effect of a subsequently enacted statute giving the officer authority to take such patents and authorizing the payment of compensation to the patentee for the taking.

None of the cases cited by the Government support the principle that an action for trespass is barred by the adoption of a statute authorizing the taking of the property or by the institution of condemnation proceedings following the adoption of such a statute.

The conclusion seems inescapable that if, in the case at bar, the acts of which complaint is made did not constitute a "taking" but did constitute a trespass or series of trespasses, the institution of condemnation proceedings could not turn the prior acts into a taking. If this be true, there is no reason to hold that a trespass action is abated or barred by the filing of a subsequent condemnation action by the Government.

II.

The Existence of Statutory Authority to Take Property Upon Which Trespasses Have Been Committed Does Not Convert the Trespasses Into a Taking.

The Government also argues that statutes were in existence by virtue of which condemnation proceedings could have been instituted at an earlier date by the Government, and, therefore, the acts of Government personnel upon the premises of the appellant necessarily constituted a taking authorized by statute.

The argument is not sound because (a) it assumes that the acts were done pursuant to the terms of the statutes cited, (b) it assumes that the acts done constituted a "taking," and (c) it assumes that the acts done were either non-negligent or, if negligent, were discretionary. These assumptions are unwarranted because the facts pleaded in the complaint do not support them; if such facts do exist, they may be appropriately pleaded by way of answer, or, the Government may seek clarification of the Complaint by a motion for a More Definite Statement.

The existence of a statute under which condemnation proceedings could be instituted does not convert every trespass into an exercise of eminent domain under authority of statute.

Carried to its extreme, the argument of the Government would mean that any time a statute permitting the condemnation of land were adopted, any Government em-

ployee or official could trespass upon the subject land at any time with immunity.

Even when the Government has instituted formal condemnation proceedings, the taking is subject to challenge by the landowner on the ground, among others, that the taking was unauthorized by statute, that the officials instituting the action did not act pursuant to the statutory mandate, but acted arbitrarily and in bad faith. (*E. g., United States v. Carmack,* 239 U. S. 230; *United States v. Oakland,* 124 F. 2d 959 (9th Cir.), *cert. denied* 316 U. S. 679; *C. M. Patten & Co. v. United States,* 61 F. 2d 970 (9th Cir.); *cf. Catlin v. United States,* 324 U. S. 229.)

III.

There May Be Successive Takings Under Exercise of the Power of Eminent Domain: The Landowner Is Entitled to Just Compensation For What Is Taken Each Time.

We have previously seen that if the acts complained of constituted simply trespasses and not a taking in the constitutional sense, we are dealing with a tort under the Federal Tort Claims Act. On the other hand, if the acts constituted an implied taking, liability of the Government, if any, is not founded on that Act, but upon the Tucker Act and upon the requirement of just compensation insured the landowner by the Fifth Amendment of the Federal Constitution.

The Government has argued (Resp. Br. p. 8) that there can be only one taking of the subject property. It suggests that it is not possible to have successive takings of property in exercise of eminent domain. This argument is sound if, but only if, the Government is talking about the taking of the same interests in the same property from

the same persons successively. Of course, the Government may take a fee simple absolute either by inverse or formal condemnation proceedings. But it may take any lesser interest. If it takes an interest in property less than a fee simple, it may thereafter decide to acquire the fee. The Government must pay for what it takes each time it acquires a further interest in the property. (See, *e. g.,* 18 *Am. Jur.,* "Eminent Domain," Sec. 88, p. 716.) The principle is clearly recognized by the Supreme Court in *United States v. General Motors Corp.,* 323 U. S. 373, at 382 (1944), a case concerning a temporary and partial taking. It cannot be doubted that if the Government subsequently took the entire fee interest in the *General Motors* case, it would not be relieved from paying for the interest which it had previously acquired or from paying for the greater interest subsequently acquired. Under such circumstances there is more than one cause of action: one is not a bar to the other.

It is even possible for the Government to take the fee interest twice, if between takings, the Government has conveyed the property to a third person: under such circumstances, the Government must pay compensation upon retaking the property. (*West Virginia Pulp & Paper Co. v. United States,* 109 Fed. Supp. 724 (Ct. Cl. 1953).

Appellant submits that the Complaint clearly indicates that if the actions of the Government agents constituted a taking, it was a partial taking only which did not constitute and could not constitute a taking of the fee. That the Government later instituted proceedings to take the fee should not preclude compensation for that portion of the property which was previously taken.

IV.

Appellant's Affidavit Was Supported by a Proper Certificate.

Appellant's affidavit contained a certificate supporting the Affidavit in the following terms:

> "I hereby certify that I am appearing in propria persona in the above-entitled case, and that the above affidavit is made in good faith." [Tr. p. 11.]

In the case of a party appearing *in propria persona* such a statement must be sufficient compliance with the statute.

If the Government's argument be accepted, that this statement is not sufficient to constitute "a certificate of counsel of record stating that it is made in good faith," one appearing *in propria persona* is foreclosed from ever filing an affidavit of bias and prejudice. Such an interpretation is subject to serious constitutional doubt. To avoid such doubt, it should be held that a party appearing *in propria persona* is his own counsel of record for the purpose of Section 144 of Title 28, United States Code.

For the foregoing reasons, Appellant respectfully urges that the Judgment and Order of the District Court dismissing her amended complaint be reversed.

Respectfully submitted,

Pancho Barnes,

Appellant In Propria Persona.